IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.14 OF 2006
WITH
CIVIL APPLICATION NO.33 OF 2006

Smt.Savitaben Ramji Patel. ..Appellant.

V/s.

Nair Shashi K. ..Respondent.

Mr.A.S.Uraizee with Ms.S.Uraizee & M.V.Singh for
Uraizee & Law Associates for appellant.

Mr.S.K.Keshwani for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 18, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Keshwani waives notice for the respondent.

4. As short question is involved, appeal is taken up for hearing forthwith by consent.

5. This appeal takes exception to the order passed by the City Civil Court, Gr.Bombay dated 13/14th December, 2005 in Notice of Motion No.4162 of 2005. The said notice of motion was filed by the plaintiff for the relief which I will refer to a

little later. The Lower court by impugned order directed the defendant not to part with physical possession or to create third party interest in the suit premises. The defendant is further restrained from conducting dance bar activities in the suit premises and selling any contraband liquor for which there is no permit for selling in the suit premises.

6. The principal grievance of the appellant before this court is that the Judgment under appeal makes no adjudication on the issue with regard to the first relief which was claimed by the plaintiff/appellant in the Notice of Motion of mandatory nature requiring the defendant to remove himself from the suit property nor the relief regarding the appointment of Court receiver during the pendency of the suit has been adverted to. Indeed, the counsel for the respondent would contend that in the second-last paragraph of the Judgment, lower court has observed that all other reliefs are rejected. That is not sufficient. If specific relief was claimed by the appellant and material has been produced on record by the respective parties with reference to the said relief, the lower court was expected to consider the said material and take one view or the other on the relief of mandatory injunction against the defendant, in the alternative

to appoint court receiver during the pendency of the suit with regard to the suit property. Merely granting injunction of the nature of the order passed which is impugned in this appeal is not sufficient in the fact situation of the present case, as no adjudication on the mandatory relief has been done by the lower court.

7. Instead of examining that relief for the first time in this court, the appropriate course to my mind is to set aside the impugned Judgment and relegate the parties before the trial court for reconsideration of the notice of motion on merits in accordance with the law.

8. Accordingly, order dated 13/14th December, 2005 passed by City Civil Court, Gr.Bombay is set aside. Notice of motion taken out by the appellant/plaintiff is restored to file on record of the trial court to its original number to be heard and finally disposed of as expeditiously as possible, preferably within three months from the receipt of the writ of this court or from the date when this order is brought to its notice by either party.

9. It will be open for the parties to file additional pleadings or any other documents as may be

advised in the said proceedings subject to such orders obtained from the lower court in that behalf. Parties shall appear before the trial court on 26/2/2006 to facilitate that court to schedule the date of hearing of the Notice of Motion. All questions are left open.

10. At this stage, counsel for the respondent/defendant submits that the defendant in fact had raised preliminary objection of jurisdiction which was required to be considered at the first instance in view of mandate of section 9A of C.P.Code. The trial court may examine that contention and pass appropriate orders as may be advised.

11. Appeal as well as civil application disposed of on the above terms.